to perform a greater service for themselves as shippers than for other shippers.[15]

The statute permits compensation only for services in transportation.[16] Here the very unloading and reloading for which these owners are paid constitutes, as to their own grain, an expensive, inseparable part of a commercial process,[17] the entire expense of which they would normally charge to their private business as grain dealers, as other shippers are obliged to do. To permit milling, dressing, or otherwise treating in transit is not a part of the duty of transportation, but is a privilege commonly accorded by carriers, ordinarily for a slight additional charge.[18] All such privileges must be scheduled with the published rates,[19] and the carrier in granting them must not discriminate between localities or persons.[20] It seems that the expense of performing such treatment for all shippers alike may under some circumstances be absorbed in the rate for transportation;[21] but there is no precedent authorizing the carrier to share the cost of the operation for those shippers alone owning elevators,[22] or to afford to them, without undergoing any expense for unloading, an opportunity to treat in transit which is not scheduled nor offered to other shippers.[23] It is submitted, therefore, that the compensation is not in fact for services in transportation, but a contribution to the commercial expenses of some dealers, to the serious prejudice of their competitors.

RAILROAD RECEIVERS. — Public interest requires that railroads shall continue to serve the public even though they have drifted into financial difficulties.[1] To permit this and to prevent mortgagees from foreclosing

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[15] *Cf.* Southern Pacific Terminal Co. *v.* Interstate Commerce Commission, 219 U. S. 498, 31 Sup. Ct. 279; United States *v.* Oregon R., etc. Co., 159 Fed. 975; Interstate Commerce Commission *v.* Reichmann, 145 Fed. 235.

[16] The material part of section 4 of the Act reads as follows: "If the owner of property transported under this act directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable. . . ." 34 U. S. STAT. AT LARGE, c. 3591, p. 589, FED. STAT., SUPP., 1909, 266.

[17] Chicago & A. Ry. Co. *v.* United States, *supra*; General Electric Co. *v.* New York Central, etc. R. Co., 14 Interst. C. Rep. 237; Solvay Process Co. *v.* D. L. & W. R. Co., 14 *id.* 246. These cases held that no allowance could be made for the use of internal transportation facilities essential to the economical conduct of large commercial plants.

[18] Southern Ry. Co. *v.* St. Louis Hay & Grain Co., 214 U. S. 297, 29 Sup. Ct. 678; In the Matter of Cotton Rates, 8 Interst. C. Rep. 121, 135; Diamond Mills *v.* Boston & Maine R. Co., 9 *id.* 311.

[19] 34 U. S. STAT. AT LARGE, c. 3591, p. 584, FED. STAT., SUPP., 1909, 260. See Central Yellow Pine Association *v.* Vicksburg, etc. R. Co., 10 Interst. C. Rep. 193, 216; In the Matter of Cotton Rates, *supra*, 135.

[20] See Southern Ry. Co. *v.* St. Louis Hay & Grain Co., *supra*, 300; Muskogee Commercial Club *v.* Missouri, etc. Ry. Co., *supra*, 317; State *ex rel.* Railroad Commissioners *v.* Atlantic Coast Line R. Co., 59 Fla. 612, 623, 52 So. 4, 8.

[21] Merchant's Cotton Press & Storage Co. *v.* Illinois Central R. Co., 17 Interst. C. Rep. 98.

[22] *Cf.* Wight *v.* United States, 167 U. S. 512, 17 Sup. Ct. 822; Evershed *v.* London & N. W. Ry. Co., 2 Q. B. D., 254.

[23] *Cf.* Southern Pacific Terminal Co. *v.* Interstate Commerce Commission, *supra*.

[1] Fosdick *v.* Schall, 99 U. S. 235. See JONES, CORPORATE BONDS AND MORTGAGES, § 555.

on their tangible property, the American courts have been compelled to resort to judicial legislation,[2] for a railroad mortgage purports upon its face to give the ordinary common-law rights.[3]

By two magnificent statutes, passed nearly half a century ago, England once and for all placed her railroad law upon a sound foundation. By the first,[4] the issue of debentures, to be charges, not upon any specific property,[5] but upon the undertaking as a whole, was authorized. By the second,[6] creditors, both secured and unsecured, were prohibited from levying execution upon the property of a railroad,[7] but permitted to apply for the appointment of a receiver. The statute then pointed out the manner in which the receiver was to apply such funds as should come to his hands. Consequently, English railroad reorganizations have been conducted ever since with little litigation. Pending reorganization, the court, through a receiver, will manage a distressed railroad and pay all running expenses. If necessary, it will borrow money to do this and make the loan a first lien upon the whole undertaking. There is no legal objection to granting this prior lien, for the lien of the debenture-holders does not attach to more than the net income.[8] If the railroad is sold the debenture-holders can claim only the residue of the fund left in the hands of the receiver after the costs of the receivership and the sums borrowed by the court have been deducted.

But in America every step towards this enlightened position has been vigorously contested. At first the courts were averse to appointing a receiver at all,[9] but this opinion has slowly given way until to-day, as in England, a railroad may itself, even before default, apply for a receiver.[10] When, having granted a receivership, the early courts were pressed by the mortgagees, claiming their "vested rights," they fortified themselves behind the doctrine that in applying to them for this peculiar relief, the mortgagees must be taken to have assented to whatever conditions the courts might choose to impose.[11] This doctrine furnished a basis for so-called "preferential claims." Wages, past as well as present, supplies, and necessary repairs were brought within this definition.[12] Opinion has so far progressed, however, that to-day these claims will be recognized even though the mortgagee did not apply for the receivership.[13] The most determined stand, however, was taken by

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[2] Three legislatures have, however, passed statutes. GEN. STAT. VT., 1870, 924; 1 N. J. REV. STAT., 1877, § 106, p. 196; OH. LAWS, 1872, §§ 1, 3, 4, p. 31.

[3] See 1 WYMAN, PUBLIC SERVICE CORPORATIONS, § 352.

[4] COMPANIES CLAUSES CONSOLIDATION ACT, 1845 (8 & 9 VICT. c. 16).

[5] *In re* Hull, etc. Ry. Co., 40 Ch. D. 119.

[6] THE RAILWAY COMPANIES ACT, 1867 (30 & 31 VICT. c. 127). *In re* Eastern & Midlands Ry. Co., 45 Ch. D. 367.

[7] Lord Cairns likens a going concern to a fruit-bearing tree. The security holders may take the fruit (the net income) as it ripens, but they must not be permitted to destroy the tree. See Gardner *v.* London, etc. Ry. Co., L. R. 2 Ch. 201, 217.

[8] For a discussion of the nature of debentures, see 24 HARV. L. REV. 389.

[9] See Meyer *v.* Johnston, 53 Ala. 237, 337.

[10] For an argument urging the older view, see 10 HARV. L. REV. 139.

[11] Fosdick *v.* Schall, *supra*.

[12] To determine what are preferential claims an analogy has at times been taken from the admiralty law. See Farmers Loan & Trust Co. *v.* Kansas City, etc. R. Co., 53 Fed. 182, 190. See CALDWELL, RAILROAD RECEIVERS, 17.

[13] "A railroad mortgagee . . . impliedly agrees that the current debts of a railroad

the mortgagees against allowing priority to receiver's certificates, but apparently with little result, for an analysis of the cases seems to show that where the proceeds of the sale of the certificates were to be used to pay priority claims, the certificates themselves will be given priority.[14] It does not appear whether this can be explained on the doctrine of subrogation or not. A recent case decides that when the proceeds have been used in paying the coupons of the bonds that were secured by the mortgage, the certificates will then also be given preference. *American Trust Co.* v. *Metropolitan Steamship*[15] *Co.*, 190 Fed. 113 (C. C. A., First Circ.). This can hardly be explained as subrogation, for the coupon-holders would only have been entitled to share in the final distribution on the same terms as the bondholders.[16] But by extending the doctrine of priority claims to include all expenses incurred in preserving the property, as well from the claims of mortgagees as from physical destruction,[17] this decision, according as it does with the current of authorities, can be satisfactorily explained. Thus, without the aid of legislation, and despite our bankruptcy rule,[18] America has nearly reached the satisfactory position long since attained by England.

REVIEW OF ORDERS IN HABEAS CORPUS PROCEEDINGS. — The weight of authority denies review by appellate courts of adjudications in *habeas corpus* proceedings.[1] *Wisener* v. *Burrell*, 28 Okl. 546, 118 Pac. 999. Any logical explanation of this variation from the general policy of allowing litigants to bring their disputes before courts of review must be found in some substantial peculiarity of *habeas corpus* proceedings. The explanation cannot be that such proceedings present no reviewable questions.[2] For upon *habeas corpus*, questions dealing with the jurisdiction of courts,[3] the validity of ordinances,[4] and the construction[5] and constitutionality[6] of statutes may be raised. Nor can the doctrine be justified on any of the procedural grounds proposed by the decisions.

company contracted in the ordinary course of its business shall be paid out of current receipts before he has any claim upon such income." See Southern R. Co. *v.* Carnegie Steel Co., 176 U. S. 257, 285, 20 Sup. Ct. 347, 358.

[14] Wallace *v.* Loomis, 97 U. S. 146; Miltenberger *v.* Longansport Ry. Co., 106 U. S. 286, 1 Sup. Ct. 140; Union Trust Co. *v.* Illinois Midland Ry. Co., 117 U. S. 434, 6 Sup. Ct. 809.

[15] No distinction has been made in the cases between a steamship company and a railroad. Whelan *v.* Enterprise Transportation Co., 175 Fed. 212. See Trust Co. *v.* Chapman, 208 U. S. 360, 28 Sup. Ct. 406 (Canal Co.).

[16] Newbold *v.* P. & S. R. Co., 5 Ill. App. 367.

[17] Lurton, J.: "I do not think that the duty of preserving the property in charge of the receivers is limited to a mere preservation of the physical structure of the railroad." See Lloyd *v.* Chesapeake, etc. R. Co., 65 Fed. 351, 358.

[18] See 1 WYMAN, PUBLIC SERVICE CORPORATIONS, § 352, n. 1.

[1] No distinction has been made between review at common law, by writ of error, and under general statutes allowing appeals.

[2] See Cox *v.* Hakes, 15 App. Cas. 506, 523.

[3] *In re* Bonner, Petitioner, 151 U. S. 242, 14 Sup. Ct. 323.

[4] *In re* Garfinkle, 37 Wash. 650, 80 Pac. 188.

[5] *In re* Authers, 22 Q. B. D. 345.

[6] Medley, Petitioner, 134 U. S. 160, 10 Sup. Ct. 384.